No. 4202 1385

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United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN, Jr.,
Defendant in Error.

PETITION FOR RE-HEARING BY PLAINTIFF IN ERROR.

JOHN L. SLATTERY,
United States Attorney.
RONALD HIGGINS,
Assistant United States Attorney.
Attorneys for Plaintiff in Error.

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Attorneys for Plaintiff in Error.

PETITION FOR RE-HEARING

Now comes the United States of America, Plaintiff in Error, in the above entitled cause, and moves the Court to grant a re-hearing in this Cause for the following reasons:

I.

That this cause was tried and is triable only under the Tucker Act (Act March 3, 1887, 24 Stat. 506; also Section 24, Par. 20, Judicial Code), and appellate jurisdiction of the same as provided by said act lies in the Supreme Court of the United States and not in the Circuit Court of Appeals for the Ninth Circuit.

> See Section 13, War Risk Insurance Act 40 Stat. 555; also Section 19 of the Act of June 7, 1924, known as the World War Veterans' Act, 1924, Public—242, 68th Congress, enacted two days prior to June 9, 1924, the date upon which this case was decided by this Honorable Court, and designated further as "An Act To consolidate, codify, revise, and reenact the laws affecting the establishment of the United States Verterans' Bureau and the administration of the War Risk Insurance Act, as amended, and the Vocational Rehabilitation Act, as amended."

Parenthetically, attention is directed that in all of the cases involving CLAIMS for War Risk Insurance which were tried by the various courts prior to the decision of the Honorable Court in the present case, it was held that such cases were properly brought under the procedure provided for by the Tucker Act, which expressly provides that such cases shall be tried by the Court without a jury.

II.

That under the Tucker Act, causes are tried without a jury, and hence there was no necessity of a waiver in writing of a jury before trying this action.

III.

That the trial court took jurisdiction of this Cause as one coming under the Tucker Act, and tried it according to the provisions of said Act, and both parties acquiesced in and believed that such jurisdiction and such trial theory were correct, and having proceeded on such basis, this action does not come within the provisions of Section 640 R. S., and the parties accordingly were not required specifically to waive a jury in writing, and having elected and accepted without objection such jurisdiction and trial theory are now foreclosed from asserting any other.

Campbell vs. Boyreau, 62 U. S. 223-228, 16 L. Ed. 96-97.

One theory cannot be accepted and prevail without objection at the trial, and another upon appeal, particularly when such condition jeopardizes and denies the rights of one of the parties. Furthermore, good faith requires that Defendant in Error continue throughout the suit as he began.

IV.

That error of law appears on the face of the record in that the complaint alleges Defendant in Error was suffering from a disability which it is reasonably certain will continue throughout the remainder of his lifetime, while judgment was given for a disability, not which was reasonably certain would continue throughout the remainder of the insured's lifetime, but which would probably exist for a long indefinite time. Thus a variance appeared in the "process, pleadings and judgment" which this Honorable Court should take cognizance of regardless of the absence of a written waiver of a jury.

V.

That the refuge which Defendant in Error sought within the provisions of Section 649 R. S. was asserted for the first time by Defendant in Error in his brief before this Honorable Court, and such tactics took Plaintiff in Error by surprise and did not allow Plaintiff in Error sufficient time to prepare for a thorough discussion and presentation of the case from such angle, and Plaintiff in Error contends for the privilege on rehearing of meeting this issue squarely.

VI.

That the case of U. S. vs. Pfitsch, 256 U. S. 547,

is not decisive of the jurisdictional question herein because there is a difference and a distinction between cases arising under Section 10 of the Lever Act and Section 13 of the War Risk Insurance Act. Under the former, the government becomes the instigator and moving party by seizing goods for war purposes, while in the latter, the insured is the moving party. The courts have consistently drawn a distinction between cases in which the United States is being sued and cases in which the United States enters the courts as a litigant. As applying to cases under the War Risk Insurance Act, the Pfitsch case is no more than dictum.

Schillinger vs. U. S. 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108.

Shooters Island Ship Yard Co. vs. Standard Ship Building Co., 293 Fed. 707.

VII.

That the statute requiring written waiver of a jury has been superceded and supplanted by Section 269 Judicial Code as amended by Act of February 26, 1919, Chapter 48; Section 1246, 1919 Supplement C. S., which latter act was passed to dispense with technicalities and to allow litigation to be disposed of upon the merits. It provides in substance that on the hearing of a Writ of Error in any civil case, the court shall give judgment

after an examination of the entire record before the court without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. Failure to waive jury trial by stipulation and file same as part of the record can be classified as nothing other than a technicality.

VIII.

That if the above action is triable under the usual and ordinary jurisdiction of the District Court, and should have been tried by jury instead of to the court, as provided by the Tucker Act, then there should be reversal and a new trial ordered, because the proceeding heretofore had was not a trial, but only a usurpation by the trial court of jurisdiction not conferred.

WHEREFORE, the Plaintiff in Error prays that a re-hearing be granted and that this Honorable Court stay its judgment and reverse the same or certify the case to the Supreme Court of the United States under the provisions of the Act of September 14, 1922 (Judicial Code 238a, 42 Stat. 837).

JOHN L. SLATTERY,
United States Attorney.

RONALD HIGGINS,
Assistant United States Attorney.

Attorneys for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

This is to certify that in our judgment the foregoing Petition for Re-hearing in the above cause is well founded, and is made and filed in good faith and is not interposed for delay.

JOHN L. SLATTERY,
United States Attorney.

RONALD HIGGINS,
Assistant United States Attorney.

Attorneys for Plaintiff in Error.